(3)

Case No. 98-223

In The
Supreme Court Of The United States
October Term 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN SNURKOWSKI
ASSISTANT DEPUTY ATTORNEY GENERAL
FLORIDA BAR NO. 158541

DANIEL A. DAVID
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0650412

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR PETITIONER

38pp

QUESTION PRESENTED

The question presented in Florida's petition for writ of certiorari was:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A WARRANT IS REQUIRED BY THE FOURTH AMENDMENT TO SEIZE A MOTOR VEHICLE UNDER A CONTRABAND FORFEITURE ACT AND FOR SUBSEQUENT SEARCH OF SAID VEHICLE CONFLICTS WITH DECISIONS OF THE COURT IN CARROLL V. UNITED STATES, CALERO-TOLEDO V. PEARSON YACHT LEASING, AND COOPER V. CALIFORNIA, THAT OF THE ELEVENTH CIRCUIT IN UNITED STATES V. VALDES AND THE MAJORITY OF STATE COURTS ADDRESSING THIS ISSUE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

STATE STATUTES

Case No. 98-223

In The
Supreme Court of the United States
October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as White v. State, 710 So.2d 949 (Fla. 1998). (JA 64-84).

The opinion of the District Court of Appeal, First District of Florida is reported as White v. State, 680 So.2d 550 (Fla. 1st DCA 1996). (JA 44-63).

Respondent filed a motion to suppress which is not reported. The trial court reserved ruling on the motion to suppress. (JA 25). The trial court denied the motion. (JA 10,41).

JURISDICTION

The Supreme Court of Florida issued its decision on February 26, 1998. Petitioner's Motion for Rehearing was denied on June 1, 1998. On July 31, 1998, Florida filed a petition for writ of certiorari, which the Court granted on November 16, 1998. This court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, §12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. This right shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States

Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The material facts, as set out in the body of the Florida Supreme Court's decision, are as follows:

> On October 14, 1993, petitioner Tyvessel Tyvorus White (White) was arrested at his place of employment on charges unrelated to his case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officers seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been used several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture by the government. After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.
>
> Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine, and subsequently the trial court formally denied White's objection and motion to suppress the cocaine evidence.
>
> On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993) (hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures.

(JA 65-66).

The dates of those prior occasions when White's automobile was used to facilitate illegal drug activity were July 26, August 4, and August 7, 1993. (JA 65, n.2). On those occasions, White was seen by police eyewitnesses, and was videotaped utilizing his car to deliver cocaine. (JA 33, 45).

White's conviction was affirmed by the Florida First District Court of Appeal. White v. State, 680 So.2d 550 (Fla. 1st DCA 1996). Pursuant to Florida law, the District Court certified the following question to the Florida Supreme Court as being of great public importance:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.

(JA-52).

The Florida Supreme Court accepted jurisdiction and answered the question in the decision under review here, White v. State, 710 So.2d 949 (Fla. 1998). (JA 64-84).

SUMMARY OF ARGUMENT

The decision of the Florida Supreme Court that the Fourth Amendment requires a warrant for seizure of an automobile under a contraband forfeiture act is not compelling. Such conclusion is contraindicated by decisions of the Court on the subject matter, erects an inflexible procedural barrier in the path of effective law enforcement, and adds no new protection for the owner of the automobile seized. The decision ignores

that the property itself, rather than the owner, is deemed "guilty" for forfeiture purposes and provides more constitutional process for the property than for the owner.

In so deciding, the Florida Supreme Court rejected controlling Eleventh Circuit precedent expressing the majority view and adopted instead the minority view expressed in a Second Circuit decision. The Florida Supreme Court's warrant requirement under the Fourth Amendment does what is neither required nor practical: it elevates the judicial preference for warrants under the Fourth Amendment into a rigid absolute. The result, as here, is an unsupportable infringement on practical, flexible law enforcement.

The Court should apply settled law, that the Fourth Amendment does not require a warrant for forfeiture where probable cause exists and further conclude that the automobile exception to the warrant requirement of the Fourth Amendment equally applies to forfeiture proceedings.

ARGUMENT

WHETHER THE FOURTH AMENDMENT REQUIRES AN ANTECEDENT WARRANT FOR SEIZURE OF A MOTOR VEHICLE UPON PROBABLE CAUSE UNDER A CONTRABAND FORFEITURE ACT (RESTATED)

The decision of the Florida Supreme Court below, holding that the Fourth Amendment requires a warrant before seizure of a vehicle under a contraband forfeiture act, is constitutionally unsound because it (1) reaches a result contrary to the Court's precedents on the subject matter,[1] (2) elevates the judicial preference for warrants under the Fourth Amendment

---

[1] In Calero-Toledo v. Person Yacht Leasing Co., 416 U.S. 663 (1974), the court, in deciding whether *ex parte* seizures of forfeited property met due process concerns held that the government could seize a yacht under the forfeiture statute without prior notice or judicial hearing. See also: United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989) (*ex parte* seizure of automobile under forfeiture statute does not violate Fourth Amendment under any Supreme Court precedent). The majority view of the federal circuits, as set out in Valdes, is that no antecedent warrant is required for seizure, search, and forfeiture of an automobile under a civil forfeiture act. United States v. Pace, 898 F. 2d 1218 (7th Cir.), cert. denied, 497 U.S. 1030, 110 S. Ct. 3286, 111 L. Ed. 2d 1218 (1990);United States v. One 1978 Mercedes Benz, 711 F. 2d 1297 (5th Cir. 1983); United States v. Kemp, 690 F. 2d 397 (4th Cir. 1982); United States v. Bush, 647 F. 2d 357 (3d Cir. 1981). The minority view as discussed in United States v. Lasanta, 978 F. 2d 1300 (2d Cir. 1992), was adopted by the Tenth Circuit in United States v. Dixon, 1 F. 3d 1080 (10th Cir. 1995), wherein the court held that either a warrant or a recognized exception thereto was required for a valid seizure. An intermediate approach has been adopted by other circuits, limiting the validity of warrantless seizure under forfeiture statutes to situations where there is an exigent exception to the warrant requirement. See for example: United States v. Linn, 880 F. 2d 209 (9th Cir. 1989).

to a rigid, unwarranted constitutional mandate,[2] (3) frustrates and hampers effective, flexible law enforcement by engrafting a procedural requirement that affords no additional protection for either a guilty or innocent owner of a seized automobile,[3] and (4) elevates protection of an accused's property over that of his person.[4] The Florida Supreme Court characterized its reasoning in White as a reaffirmation of an earlier decision in Department of Law Enforcement v. Real Property, 588 So.2d 957, 965 (Fla. 1991), that "we were only able to uphold the constitutionality of Florida's forfeiture act by imposing numerous restrictions and safeguards on the use of the act in

---

[2] While other jurisdictions may be inclined or have statutory or constitutional provisions authorizing judicial intervention prior to a seizure in forfeiture, the Florida Supreme Court, since 1982, has been prohibited from interpreting the fourth amendment in a fashion contrary to decisions of this Court. See: Art. I, Sec. 12 of the Florida Constitution, known as the conformity clause, mandates that the court be "bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and **provide no greater protection than those interpretations**." Bernie v. State, 524 So. 2d. 988, 990-91 (Fla. 1988) (emphasis added).

[3] See United States v. Valdes, supra, where the court, citing to United States v. Watson, 423 U.S. 411 (1976), observed "The Court upheld Watson's arrest by balancing the interest of the individual citizen in maintaining his liberty against the public's need to control crime. The Court then concluded that if it gave "maximum protection [to] individual rights . . . by requiring a magistrate's review of the factual justification prior to any arrest," it would create "'an intolerable handicap for legitimate law enforcement.'" Id., at 417-18, 96 S.Ct at 825 (quoting Gerstein v. Pugh, 420 U.S. 103, 113, 95 S.Ct. 854, 862, 43 L.Ed.2d 54 (1975))." 876 F.2d at 1559.

[4] See: Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576 (1967) (The instrumentality of the drug dealer's criminal conduct should gain no greater protection than the dealer himself.)

order to protect a citizen's property from arbitrary action by the government." White, 710 So. 2d at 950. In fact, as the dissent points out, the

> majority's quote omits the following sentence which completes the paragraph from which the quote in the majority opinion is taken: 'In those situations where law enforcement agency already has lawfully taken possession of personal property during the course of routine police action, the state has effectively made an *ex parte* seizure for the purposes of initiating a forfeiture action. 588 So.2d at 965. Through the date of that opinion (in fact until today) law enforcement agencies were considered to have lawfully taken possession of personal property when possession was taken on the basis of and in conformity with the forfeiture statute. Lamar [v. Universal Supply Co., 479 So.2d 109 (Fla. 1985)], 479 So.2d at 110. When Department of Law Enforcement is read in full context, that decision cannot be fairly said to engraft a warrant requirement into the statute.

White, 710 So.2d. at 956 (Fla. 1998) (Wells, dissenting). Moreover, the majority in White, finding no guidance in decisions from this Court, rejected a controlling circuit opinion in United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989), and opted for a minority view from another circuit in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), concluding:

> Similarly, the absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here. The exception does not apply when no probable cause exists and the police arrest either a sleeping suspect, Lasanta, or a suspect at work with the keys in his pocket. White. There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to

search the vehicle for contraband known to be therein, and that might be lost if not seized immediately.

710 So.2d at 953-954.

As a result of the Florida Supreme Court's decision, a clear opportunity to resolve an unaddressed question left open in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 2090, 40 L.Ed.2d 452, n.14 (1974), has arisen. Specifically, whether the warrant or probable cause requirements of the Fourth Amendment are applicable to a forfeiture statute and, whether, as the court in White opined, to what extent "the warrantless seizure of a citizen's property is protected by the federal and Florida constitutions even when the seizure is made pursuant to a statutory forfeiture scheme."

Previous decisions of the Court on seizure questions strongly suggest the answer is "no".[5]

---

[5] No warrant was obtained in Calero-Toledo. Nor was a warrant required for the seizure in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), or in Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), nor in Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931). No intervening warrant was necessary for the search of the car in Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), after it had already been stopped on probable cause and the car was later searched; see also Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed.2d 151 (1938); and United States v. Johns, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985), no warrant required where the vehicle search occurred three days after appellant was arrested and his truck seized for marijuana smuggling at a remote desert airstrip; Florida v. Meyers, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984), no warrant for a second search of a vehicle after it had been impounded for eight hours in a secure impound lot. Michigan v. Thomas, 458

In Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970), the Court held: "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974):

> At least since *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less stringent warrant requirements have been applied to vehicles.

South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d (1976):

> This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are effects and thus within the reach of the Fourth Amendment, warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.

(Internal quotation marks and citations deleted).

Under well established caselaw regarding the forfeiture doctrine, the "thing" itself is deemed the offender. Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801, 2808, 125 L.Ed.2d 488 (1993): "The fiction that 'the thing is primarily considered the offender,' has a venerable history in our case law.", citing to J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376 (1921); United States v. United States Coin and Currency, 401 U.S.

U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750(1982), no warrant for second search extending to opening the air vents under the dashboard of a car whose occupants had been arrested for open container of alcohol, following an original inventory search which uncovered two bags of marijuana in the unlocked glove compartment.

715, 719-720, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971) (property seized under forfeiture is believed to have committed the crime); and The Palmyra, 25 U.S. 1, 12 Wheat. 1, 6 L.Ed. 531 (1827). In the instant circumstances, White's automobile did not cleanse itself of its taint in 68 days. Once probable cause existed for forfeiture, it remained eligible for forfeiture barring some "external event" which could have changed the complexion of the basis to seize.[6]

White used his automobile to sell and deliver cocaine. He was seen by police eyewitnesses on three occasions, and was caught on videotape.[7] White v. State, 680 So.2d 550, 551 (Fla. 1st DCA 1996). White's car thus falls squarely within the proscription of Section 932.702(3), of the Florida Contraband Forfeiture Act[8] making it unlawful to "use any ... motor vehicle ... to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." Upon

---

[6] From the date of White's last auto-based dope deal on August 7, 1993 (710 So.2d 949, 950, n.2), until his arrest on other drug charges (680 So.2d 550, 551) on October 14, 1993 (710 So.2d 949, 950), only 68 days had passed.

[7] Apparently, at least one of the videotaped sales was directly out of the car, where appellant handed the drugs out through the window of his car to a person parked next to him. (JA 33).

[8] Sections 932.701-932.707, Florida Statutes (1993). Like the Florida Contraband Forfeiture Act, its federal analogue, 21 U.S.C. Sec. 881 (b)(4), provides for warrantless seizure on probable cause. The forfeiture statute under attack in Calero-Toledo (P.R. Laws Ann., Title 24, Sec. 2512 (Supp. 1973)), was modeled upon the 1970 version of Sec. 881. See Good, 510 U.S. 43, 114 S. Ct. 492, 500, 126 L. Ed. 2d 490 (1993). See Calero-Toledo, at n. 25: "But for unimportant differences, P.R. Laws Ann., Title 24, s. 2512 (a) (Supp. 1973) is modeled after 21 U.S.C. s. 881 (a)." The Florida Supreme Court in Duckman v. State, 478 So. 2d 347, 349, n. 3 (Fla. 1985), similarly concluded the state and federal forfeiture provisions were the same.

that event (using vehicle to sell and deliver cocaine), the personal property (the vehicle), "may be seized at the time of the violation **or subsequent to the violation[.]**" Section 932.703(2)(a), Florida Statutes (1993) (emphasis added).

The failure of police to seize the vehicle immediately without warrant at the time of the sale rather than later under the contraband forfeiture act precipitated the Florida Supreme Court to hold the later warrantless seizure ran afoul of the Fourth Amendment, 710 So.2d 949, 953:

> There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity.

The Court, in Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280, 283-284, 69 L.Ed.2d 543 (1925), stated however,

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

The Florida Supreme Court's "immediacy" requirement, to-wit: the necessity that officers act contemporaneously upon their belief that the vehicle contains contraband[9], or else the

---

[9] The search here after seizure, which uncovered the cocaine in the ashtray, was for inventory purposes. (JA 23-24). Such a search is unquestionably valid, South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 3099, 49 L.Ed.2d 1000 (1976), **and its validity is not the subject of inquiry in this case.**

seizure and subsequent search is bad[10], is refuted by Carroll, Cooper, and Calero-Toledo. In Calero-Toledo, police discovered marijuana on board the leased yacht in "early May 1972," 94 S.Ct. at 2082, and seized the vessel pursuant to the forfeiture statute on July 11, 1972. Id. at 2083. In Carroll, the Court found probable cause for federal prohibition agents to search a motor vehicle *sans* warrant on December 15, 1921, some 16 miles away from where it had been seen transporting the participants to a failed liquor sale on September 29, 1921. 267 U.S. at 134-136. Likewise, in Cooper, the Court found a search without warrant of a vehicle that had already been impounded in a garage for a week comported with the Fourth Amendment. 386 U.S. at 58, 62.

In United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 827, 828, 46 L.Ed.2d 598 (1976), the court observed in the context of warrantless arrests of persons, which was based on statutory authority, that:

> Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. *See United States v. Ventresca*, 380 U.S. 102, 106, 85 S.Ct. 741, 744-745, 13 L.Ed.2d 684 (1965); *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512, 12 L.Ed.2d 723 (1964); *Wong Sun v. United States*, 371 U.S. 471, 479-480, 83 S.Ct. 407, 412-413, 9 L.Ed.2d 441 (1963). But we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

---

[10] The Florida Supreme Court stated: "Critically, there must be probable cause to believe contraband is in the vehicle at the time of the search and seizure, *Carney*, and there must be some legitimate concern that the automobile 'might be removed and any evidence within it destroyed in the time a warrant could be obtained.' *Lasanta*, 978 F.2d at 1305.", 710 So.2d at 953 (footnote deleted), citing *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), and *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992), respectively, for these propositions.

In Watson, the Court noted that arrest without warrant of a person was the rule at both the state and federal levels since at least colonial times. 96 S.Ct. at 825-826. As the Court has recognized, exigent circumstances as to an automobile can develop virtually instantaneously. See Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 2478-2468, 41 L.Ed.2d 325 (1974) (plurality opinion). There, after the defendant was arrested for murder, the police took his keys and seized his car from a public commercial parking lot a half-block away from the station house. The car was then towed to a police impound lot. The Court found the car validly seized under these circumstances, 94 S.Ct. 2472:

> Respondent contends that here, unlike Chambers probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. **Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest.** Cf. Chambers, id., at 50--51, 90 S.Ct., at 1980--1981. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.

(Emphasis added).

The time frame in which the Court found the automobile seizure without warrant in Cardwell permissible under the Fourth Amendment compares directly with the time frame the

Florida Supreme Court *sub judice* found impermissible. Moreover, to the extent that the rationale of the Florida Supreme Court finds any succor whatsoever in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), that reliance is misplaced.[11] The Court in Cardwell specifically distinguished Coolidge when the seizure of the automobile occurs in a public, commercial parking lot as opposed to a residential driveway, which is precisely the factual situation here, 94 S.Ct. 2464, 2471:

> Respondent asserts that this case is indistinguishable from *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). We do not agree. The present case differs from *Coolidge* both in the scope of the search and in the circumstances of the seizure. Since the Coolidge car was parked on the defendant's driveway, the seizure of that automobile required an entry upon private property. Here, as in *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the automobile was seized from a public place where access was not meaningfully restricted. This is, in fact, the ground upon which the *Coolidge* plurality opinion distinguished *Chambers*, 403 U.S., at 463 n. 20, 91 S.Ct., at 2036. *See also Cady v. Dombrowski*, 413 U.S. 433, 446--447, 93 S.Ct. 2523, 2530--2531, 37 L.Ed.2d 706 (1973).

Nor does the decision of the Florida Supreme Court find any support from any principle of due process applicable to

---

[11] "Even though automobiles are afforded lesser Fourth Amendment protection, there is still a strong presumption against warrantless searches and seizures of a citizen's property by the government, absent exigent circumstances. *See Coolidge*, 403 U.S. at 468, 91 S.Ct. at 2039 (reiterating that 'even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.') *Coolidge's* requirement that a 'plain view' seizure must also be 'inadvertent' was overruled in *Horton*, 496 U.S. at 140, 110 S.Ct. at 2310. Minus that incidental reasoning, *Coolidge* remains good law." 710 So.2d 949, 954, n.8.

forfeiture of an automobile. In United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), the Court held that government seizure of real property implicates both the Fourth Amendment and the Due Process Clause of Fifth Amendment. In Good, the Court explored the procedural protections due for seizure of real property and found that a heightened level of procedural protection was due for real property as opposed to mobile property. In so doing, the Court reaffirmed the rationale of Calero-Toledo, 510 U.S. at 52:

> Whether *ex parte* seizures of forfeitable property satisfy the Due Process Clause is a question we last confronted in *Calero-Toledo v. Pearson Yacht Leasing Co.*, supra, which held that the Government could seize a yacht subject to civil forfeiture without affording prior notice or hearing. Central to our analysis in *Calero-Toledo* was the fact that a yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." *Id.*, at 679, 40 L Ed 2d 452, 94 S Ct 2080. The ease with which an owner could frustrate the Government's interests in the forfeitable property created a "'special need for very prompt action'" that justified the postponement of notice and hearing until after the seizure.

(Citations deleted).

Calero-Toledo provides a rational, working analysis from which to draw for any automobile seizure under forfeiture. As such, no credible contention can be asserted that the seizure here would be impermissible under Calero-Toledo. The Court in Good noted the three part test of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 218 (1976), "provides guidance" in the forfeiture and seizure area. 510 U.S. at 53. Noting that this test was applied in Good in the context of forfeiture of real property, which the Court found to have heightened procedural protection over movable property, it also provides succor in this case involving highly mobile property, 510 U.S. 53:

> The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose.

(Citations deleted).

Applying those factors *in seriatim* to the instant action shows that the antecedent warrant requirement added onto the Fourth Amendment where probable cause exists to seize a vehicle is not constitutionally mandated.[12]

Private interest affected by the official action.

The private interest affected here is temporary deprivation of one's automobile. Chapter 932.703(2)(a) of the Florida Contraband Forfeiture Act provides for notice at the time of seizure, or by return receipt certified mail, of the right to an adversarial preliminary hearing after the seizure to determine probable cause whether the property has been, or is being used to violate the act.[13]

---

[12] Indeed, the notion that some "protection" will accrue is highly suspect at best. The best constitutional protection is the expeditious testing before a magistrate of the circumstances derived from the seizure.

[13] The same section of the act directs the seizing agency to make diligent efforts to notify the person affected, in any case within five working days after the seizure, if done by certified mail. The notice must state that the person entitled to notice may request an adversarial preliminary hearing within 15 days after receipt of the notice. Such hearing, if requested, must be held within 10 days after the request, or as soon thereafter as is practicable. The Act provides additional procedural protections for the persons with an interest in

A person aggrieved by seizure and potential forfeiture of his car can have the issue judicially resolved in a prompt and timely fashion.[14] It is of further note that such deprivation of the automobile can well be temporary. Section 932.703(2)(c) of the Act provides that at the hearing, if the court concludes there was probable cause for the seizure, the court shall authorize seizure or continued seizure of the property. *A fortiori*, if insufficient probable cause is established at the post-seizure adversarial preliminary hearing, the property is to be returned to the owner. Such post-seizure judicial determination is constitutional. Calero-Toledo. It protects the interests of both the owner of the seized property and society. The owner of the property has the propriety of the seizure upon probable cause judicially examined within days. Such minimal deprivation upon an owner is outweighed by the interest of society, which is furthered by enabling quick, flexible action by law enforcement to get conveyances furthering the drug trade out of

---

the affected property, noting that replevin may be sought to recover the property if forfeiture proceedings are not initiated within 45 days after the seizure. The court can extend the 45 days to initiate seizure proceedings to 60 days upon good cause. Chapter 932.703(3), Florida Statutes (1993). Other protections afforded by the act include affirmative defenses for an "innocent owner," §§ (6)(a); bonafide lienholder, §§ (6)(b); ownership interest of a joint husband and wife, §§ (6)(c); car rental company, §§ (6)(d); and innocent co-owner, §§ (7).

[14] Florida courts have strictly enforced the time limit provisions against the government. See State Department of Highway and Safety and Motor Vehicles v. Metiver, 684 So.2d 204 (Fla. 4th DCA 1996), affirming trial court's dismissal of forfeiture action and order requiring return of seized cash to person from whom it was seized due to a 5 day delay in setting the hearing. In the White case, White has never claimed any lack of notice, nor challenged the adequacy of post seizure hearings, or asserted a due process claim.

circulation.[15] Also, if there is no innocent owner defense to forfeiture itself, Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), the guilty owner here cannot complain that the judicial determination of forfeiture is held later rather than sooner.

Risk of erroneous deprivation through current procedures and probable value of additional safeguards.

White's vehicle could only be validly seized upon probable cause that it had been, or was being used, in violation of the Florida Contraband Forfeiture Act. Section 932.703 (2)(c), Florida Statutes (1993).[16] White was utilizing his vehicle to sell and deliver cocaine, thus making his vehicle eligible for forfeiture. The crux of the Florida Supreme Court's quarrel is that the probable cause for forfeiture determination was made and acted upon by law enforcement without intervening review by a magistrate.

All persons who have their car seized on probable cause to believe the vehicle is being used to violate the Florida Contraband Forfeiture Act are entitled to post seizure hearing.[17] The Florida Contraband Forfeiture Act provides a

---

[15] Note in Indialantic Police Dept. v. Zimmerman, 677 So.2d 1307 (Fla. 5th DCA 1996), where the seizing agency appealed the determination that there was no probable cause for the initial vehicle stop and thus the vehicle must be handed back to the owner. The appellate court reversed the lower court's determination that there was no probable cause for the stop and subsequent search.

[16] An examination of the federal forfeiture statute, 21 U.S.C. Sec. 881, interpreted in Valdes, to require no pre-seizure warrant and the statute under scrutiny are analytically indistinguishable to the issue presented.

[17] At such hearing, the court shall review the verified affidavit, any supporting documents, and take any testimony to determine whether there is probable cause the property was used, is

person aggrieved by a seizure of an automobile: notice, opportunity for hearing to contest the seizure, and determination of probable cause for the seizure by a neutral magistrate.

The Constitution neither commands, nor logically countenances more than provided under the forfeiture laws. Moreover, significant and important governmental interests underlying forfeiture of conveyances to curtail the drug trade are strong:

> Forfeiture of conveyances that have been used--and may be used again--in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.

Calero-Toledo, 416 U.S. 663, 94 S.Ct. 2080, 2094, 40 L.Ed.2d 543 (1974). And, as further noted in Calero-Toledo, 94 S.Ct. at 2090:

> preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized--as here, a yacht--will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.

From a due process perspective, the Court has recognized that "the overarching factor is the length of the delay" between seizure and a hearing to contest the seizure. U.S. v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency, 461 U.S. 555, 103 S.Ct. 2005, 2012, 76 L.Ed.2d 143 (1983). The Court indicated the key to this inquiry is

> whether the claimant has been prejudiced by the delay. The primary inquiry here is whether the delay has

---

being used, was attempted to be used, or was intended to be used to violate the act. Section 932.703 (c), Florida Statutes (1993).

> hampered the claimant in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence. Such prejudice could be a weighty factor indicating that the delay was unreasonable.

In White's case, there is no plausible claim that he was adversely impacted in his ability to put on a defense to the forfeiture at a hearing under the forfeiture act.

The State's Interest, and the Additional Administrative Burden the Added Procedural Requirement Imposes.

The additional administrative burden laid upon every seizure by the Florida Supreme Court in interpreting the application of the Fourth Amendment is incalculable. See United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989), (Eleventh Circuit decided this same question contrary to the Florida Supreme Court.)[18] Setting such an arbitrary roadblock in the path of effective police investigation is unwarranted. The added procedural burden imposed by the Florida Supreme Court is thus seen to be improper under the third prong of the test.[19]

---

[18] Such result should not be countenanced in this case under any principle of federalism. Under Art I, §12 of the Florida Constitution, Fourth Amendment issues in the Florida courts must be decided in conformity with decisions of the Court, and the Florida courts can afford no higher level of Fourth Amendment protection, Bernie v. State, 524 So.2d 988, 990-991 (Fla. 1988). See White, 710 So.2d 949, 950, n.3. Thus, by operation of the Florida Constitution, there is no federalism issue because there is no independent state law basis to support the decision of the Florida Supreme Court. The issue is thus governed solely by the Fourth Amendment as interpreted by the Court.

[19] A case illustrating this potential state-federal effort is In re Forfeiture of Ten Thousand Seven Hundred Eighty-eight Dollars ($10,788.00) in U.S. Currency, 580 So.2d 855 (Fla. 2d DCA 1991),

In U.S. v. Valdes, 876 F.2d 1554, 1559-1560 (11th Cir.1989), the court opined:

> A seizure of property under section 881(b)(4) is essentially the same as the arrest of a person. In both cases, the object seized is believed to have committed a crime. *See United States v. United States Coin and Currency*, 401 U.S. 715, 719-20, 91 S.Ct. 1041, 1044, 28 L.Ed.2d 434 (1971) (forfeit property has traditionally been viewed as being guilty of wrongdoing). In both cases, the police must possess articulable facts to support such belief before they can take the object into custody. Moreover, if the owner of property seized under section 881(b)(4) believes that his property was seized without probable cause, the law provides him remedies essentially the same as those provided arrestees. The owner can challenge the seizure before a neutral magistrate; if the magistrate decides in his favor, the property will be released. If the officers responsible for seizing the property erred, they may be held accountable in much the same fashion as officers who make an illegal arrest. They may have to respond to the property owner in money damages, and they may be disciplined. Lastly, the "fruit of the poisonous tree" doctrine may render inadmissable evidence obtained as a result of the unlawful seizure. *See Segura v. United States*, 468 U.S. 796, 804-08, 104 S.Ct. 3380, 3385-87, 82 L.Ed.2d 599 (1984).
>
> If federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without repairing to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs. Appellants would have us accord the trafficker's property interest greater deference than his

---

where the Florida Department of Law Enforcement (FDLE) sought forfeiture in a state court proceeding of cash from a loansharking business.

> liberty interest; they seem to suggest that the injury caused by erroneous detention (i.e. the period of time between seizure, or arrest, and the magistrate's ruling ending the detention) is somehow greater in the case of one's property than it is in the case of one's liberty. We are not persuaded. We therefore hold that the warrantless seizures of appellants' automobiles, and the subsequent inventory searches, were not unreasonable under the fourth amendment.

(Footnotes deleted).

In rejecting the majority view, the Florida Supreme Court observed,[20] 710 So.2d 949, 954:

> Finally, the reasoning of the district court majority, that since a defendant's person can be seized without a warrant his property should be no different, simply proves too much. If we were to follow that reasoning to its logical conclusion we would, in essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property. It will always be more intrusive to seize a person than it will be to seize his property. That is the nature of human values. However, such an approach would apparently have us do away with the constitutional law of search and seizure as to property entirely, simply because we have permitted the warrantless arrest of a person.

(Footnote deleted).

In adopting the minority view[21] of United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), the Florida Supreme Court not only rejected controlling authority of this circuit, but more importantly elected to expand Fourth Amendment rights beyond that which is required.[22] In Lasanta, the Second Circuit

---

[20] The Florida Supreme Court decision is also contrary to a majority of state courts which have addressed this issue under federal, as opposed to a state constitutional grounds. In Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820, 232 Ga. 671, 208 S.E. 2d 483 (Ga. 1974), the Georgia Supreme Court permitted warrantless seizure and subsequent forfeiture of liquor kept at a social club in a "dry" county. Relying upon Calero-Toledo, the court found that opportunity for post-seizure hearing to contest the validity of the seizure was "sufficient process of law under the Federal Constitution[.]" 208 S.E. 2d at 485. In State v. Brickhouse, 20 Kan. App. 2d 495, 890 P. 2d 353 (Kan. App. 1995), the Kansas court upheld warrantless seizure, search and forfeiture of an automobile under a state forfeiture act because police officers had probable cause to believe the car was being used to violate state drug laws. Relying on Cooper and Valdes, and rejecting Lasanta the Kansas court stated it found the majority view persuasive and held the warrantless seizure and subsequent search of the car under the state forfeiture act based on probable cause, not to violate the Fourth Amendment. In State v. Gwinner, 59 Wash. App. 119, 796 P. 2d 728 (Wash. App. 1990), review denied, 117 Wash. 2d 1004, 814 P. 2d 266 (1991), a state officer provided a tip to federal officers which ultimately led the DEA agents to seize and search a truck without a warrant pursuant to Sec. 881 (b)(4). The state court in considering the validity of search, found the challenge to the seizure did not violate the Fourth Amendment under the federal law. The state court recognized that although valid under the Fourth Amendment, it might be invalid under the state constitution, however, the federal officers were to be judged under federal, not state law.

[21] Only two state courts have reached a result akin to that of the Florida Supreme Court: Davis v. State, 813 P. 2d 1178, 1182-1183. (Utah 1991); Application of Harnuschfeger, 158 Misc. 2d 299, 600 NYS 2d 894 (Supp. 1993).

[22] The Florida Supreme Court has recently reached out once again to adopt a minority view of Fourth Amendment search and seizure jurisprudence. In J.L. v. State, Case No. 90,361 (Fla. December 17, 1998), the state court refused to adopt a firearms exception to the general rule that corroboration of only innocent details in an anonymous tip does not provide police officers with

acknowledged that language found in 21 U.S.C. Sec. 881 (b)(4) supported a warrantless seizure of Cardona's vehicle, and noted that the "attorney general claims to have had probable cause to believe Cardona's vehicle was used 'to transport, or ... to facilitate the transportation, sale, receipt, possession, or concealment of' controlled substances. 21 U.S.C. Sec. 881 (a)." Lasanta, 978 F. 2d at 1304. The court however, characterized the government's actions as erroneous and contrary to the fourth amendment opining:

> The government disclaims the need to justify its warrantless seizure of Cardona's limousine with any of the traditional exceptions to the fourth amendment. It contends that the plain language of the civil forfeiture statute absolves it of any responsibility to obtain a warrant in executing seizures of property used in connection with controlled-substance transactions. The government argues that the forfeiture statute represents congress's decision to create a new exception to the Fourth Amendment's warrant requirement. In essence, it argues that congress has amended the constitution. To state the position is to refute it, because congress cannot authorize by legislation what the constitution forbids....

978 F. 2d at 1304.

The court fashioned the government's argument as being, the civil forfeiture statute

> represents congress's considered exemption of the executive branch from the strictures of the fourth amendment; and that the war on drugs justifies a ruling that courts deem warrantless seizures constitutionally adequate **even when they are grounded solely on the attorney general's affirmation that probable cause existed to believe the property was used in connection with the facilitation of transactions in narcotics,** see 21 U.S.C. Sec. 881 (b)(4).

978 F. 2d at 1304-1305 (emphasis added). The court rejected "out of hand the government's argument" holding that "it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon (the war on drugs) were to leave the constitution itself a casualty." 978 F. 2d at 1305.[23]

This minority view starts off on the wrong footing; it creates a procedural step of requiring a warrant before seizure under a forfeiture statute where no such requirement exists. It erects arbitrary roadblocks in the path of effective law enforcement and transforms a judicial **preference** for a warrant, Watson, supra, into a newly found constitutional imperative, in an effort to prevent the government's "relentless and imaginative use of that weapon" in the war on drugs.[24]

---

reasonable suspicion of criminal activity. In so doing, as pointed out by the dissent, the court adopted a holding "contrary to the view of the overwhelming majority of jurisdictions that have considered the issue."

[23] It should be noted that in spite of these harsh and dire pronouncements, the court found "any constitutional upheaval" to be harmless error and affirmed Cardona's conviction.

[24] Representative of this is Ala. Code §20-2-93(b)(4), which provides that "Seizure without process may be made if: (4) the state, county, or municipal law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter." Similar provisions are to be found in Ark. Code Ann. §5-64-505(b)(4); Cal. Health & Safety Code §11471(d); Col. Rev. Stat. Ann. §16-13-504(1); Del. Code Ann. Title 16 §4784(c)(4); Ga. Code Ann. §16-13-49(g)(2); Haw. Rev. Stat. Ann. Ch. 712A-6.(1)(c)(iv); Idaho Code §37-2744(b)(4); Kan Stat. Ann. §60-4107(b); Ky. Rev. Stat. Ann. §218A.415(1)(d); Me. Rev. Stat. Ann. Title 15 §5826.D.; Md. Ann. Code Art. 27, §297(d)(iv); Mich. Stat. Ann. Title 14 §14.15 (7522)(d); Miss. Code Ann. §41-29-153(b)(4); Mont. Code Ann. §44-12-103(1); Neb. Rev. Stat. §28-431(1)(f); N.H. Rev. Stat. §318-B: 17-b-I-b(b); N.M. Stat. Ann. §30-31-35.B.(4); Nev. Rev. Stat. Ann. §179.1165.2(d); N.D. Cent.

Additionally, the settled doctrine of seizure of an automobile without warrant does not "amend the Fourth Amendment out of the Constitution[.]" Application of the doctrine to White's automobile, for example, does nothing more than apply the limited automobile exception to the warrant requirement of the Fourth Amendment to an automobile. The Florida Supreme Court and the minority view, in fact, do "away with the constitutional law of search and seizure as to property entirely," since no warrant is required for the seizure and subsequent search of an automobile on probable cause.[25]

Beyond peradventure, the majority view requiring no preseizure warrant for seizure of instrumentalities under forfeiture statutes satisfies all requirements under the Fourth Amendment.

Code §19-03.1-36.2.d.; Okla. Stat. Title 63, §2-504.4; 42 Pa. C.S.A. §6801(b)(4); R.I. Gen. Laws §21-28-5.04.2(c)(3)(D); S.C. Code Ann. §44-53-520(b)(4); S.D. Codified Laws §34-20B-75.(4); Tenn. Code Ann. §53-11-451(b)(4); V.I. Code Ann. Title 19, §623(b)(4); Wash. Rev. Code Ann. §69.50.505(b)(4); Wis. Stat. Ann. §961.55(2)(d); Wyo. Stat. Ann. §35-7-1049(b)(iii).

[25] "The exception recognized in *Carroll* is unquestionably one that is 'specifically established and well delineated.'" U.S. v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982).

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits that the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN SNURKOWSKI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 158541

DANIEL A. DAVID
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0650412

OFFICE OF ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR PETITIONER